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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the court of appeals abused its discretion in refusing to reinstate his appeal which had been dismissed on the ground that he was a fugitive.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of interstate transportation and concealment of a stolen motor vehicle in violation of 18 U.S.C. 2312 and 2313. On February 2, 1973, he was sentenced to concurrent terms of five years' imprisonment on each count. Petitioner filed a notice of appeal and filed his brief with the court of appeals on June 1, 1973. The district court granted his motion for release pending appeal under a surety bond (Pet. App. 1a-2a).

On June 1, 1973, the same day that his brief was filed with the court of appeals, petitioner escaped from custody of the State of Georgia while a state court jury was deliberating at his trial on charges of forgery. He was subsequently found guilty on the forgery charges and was sentenced *in absentia* to imprisonment for forty years, whereupon the state court issued a bench warrant for his arrest (Pet. App. 2a).

On June 15, 1973, the government filed in the district court a motion for forfeiture of petitioner's appeal bond, on the ground that petitioner in the interim had escaped from state custody. The government also filed with the court of appeals a motion to dismiss petitioner's appeal, on the same ground. After a show cause hearing held on June 18, 1973, at which petitioner failed to appear, the district court determined that it lacked jurisdiction to order forfeiture of the appeal bond and that the motion should be directed to the court of appeals (Pet. App. 2a).

On June 18, 1973, the clerk of the court of appeals mailed to petitioner's counsel a notice advising petitioner of the government's motion to dismiss his appeal and stating that the motion would be presented to the court for disposition, together with any response petitioner might file, on June 25, 1973. At the request of his counsel, petitioner's time for responding to the motion was extended to July 3, 1973. On June 19, 1973, the government filed in the court of appeals a motion to forfeit petitioner's appeal bond. The government served petitioner's counsel with copies of the motion, in which the proceedings to date were summarized.

On July 3, 1973, petitioner's counsel filed in the court of appeals a response to the motion to dismiss. On August 2, 1973, the court of appeals conditionally revoked petitioner's appeal bond, conditionally dismissed the ap-

peal, and remanded the cause to the district court for a hearing at which petitioner was directed to appear in person (accompanied by counsel if he wished) and show cause why the conditional orders should not be made final. The court of appeals directed that copies of the judgment and of the district court's subsequent order setting the matter for hearing be served on petitioner's counsel and on the attorney who had represented petitioner at his state trial, that copies also be mailed to petitioner at his last known address, and that a transcript of the ordered hearing be certified to it. *United States* v. *Shelton*, 482 F. 2d 848, 849, certiorari denied, 414 U.S. 1075. The district court duly issued the order and served it as directed by the court of appeals (Pet. App. 3a).

Petitioner did not appear at the show cause hearing. Petitioner's counsel, who did appear, gave no explanation for petitioner's failure to appear, stating that he had talked with petitioner by telephone but was not aware of petitioner's whereabouts. The district court found that sufficient cause had not been shown and concluded that there was no reason why the conditional dismissal of appeal should not be made final (Pet. App. 3a). On November 12, 1973, the court of appeals, in an unreported order, made the above-mentioned conditional order final (Pet. App. 3a), and this Court denied certiorari, 415 U.S. 976.

On December 25, 1974—more than a year and a half after he had escaped from custody—petitioner was arrested by federal authorities in Orlando, Florida. On December 30, 1974, he began service of his federal sentence (Pet. App. 5a; Pet. 5).

On January 10, 1975, petitioner moved to reinstate his appeal in the court of appeals. The court denied this motion on February 24, 1975 (508 F.2d 797; Pet. App. 1a-5a), and subsequently denied his petition for a rehearing (511 F.2d 1192; Pet. App. 5a-6a).

Petitioner contends that the court of appeals abused its discretion in refusing to reinstate his appeal. As the court of appeals correctly recognized, however, it is entirely within the discretion of the court to dismiss the appeal of a fugitive unconditionally without waiting until he is returned or captured. See *Molinaro* v. *New Jersey*, 396 U.S. 365. Fugitive status "disentitles the defendant to call upon the resources of the Court for determination of his claims" (*id.* at 366). In *Allen* v. *Georgia*, 166 U.S. 138, this Court upheld as against a constitutional due process attack a state court's dismissal of the appeal of an escaped prisoner and its refusal to reinstate his appeal upon his later recapture. See also *National Union* v. *Arnold*, 348 U.S. 37, 43. "Disposition by dismissal of pending appeals of escaped prisoners is a longstanding and established principle of American law." *Estelle* v. *Dorrough*, No. 74-479, decided March 17, 1975, slip op. 3. See also *United States* v. *Tremont*, 438 F. 2d 1202 (C.A. 1); *United States ex rel. Bottoms* v. *Eberhardt*, 467 F. 2d 578 (C.A. 5); *United States* v. *Swigart*, 490 F. 2d 914 (C.A. 10); *Brinlee* v. *United States*, 483 F. 2d 925 (C.A. 8); *United States* v. *O'Neal*, 453 F. 2d 344 (C.A. 10).

Here, moreover, the court of appeals gave petitioner a reasonable opportunity to preserve his appeal by appearing in the district court on remand and showing why the appeal should not be dismissed. He failed to appear. Indeed, he remained a fugitive for nearly 16 months thereafter.[1] In these circumstances, the court of appeals did not abuse its discretion by failing to reinstate the appeal after petitioner was apprehended.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[1]Petitioner's reliance upon *Starke* v. *United States*, 338 F. 2d 648 (C.A. 4) is unpersuasive, since in *Starke* it was the oversight of the defendant's attorney, rather than the defendant's decision to flee the jurisdiction and subsequent capture, which required reinstatement of the appeal.